CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 186/15

In the matter between:

KAREL SNYDERS	First Applicant
SOFIA SNYDERS	Second Applicant
MINOR CHILDREN	Third Applicant
and	
LOUISA FREDERIKA DE JAGER	Respondent

Neutral citation:	*Snyders and Others v de Jager* [2016] ZACC 54
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Zondo J (majority): [1] to [22] Froneman J (dissenting): [23] to [33]
Heard on:	2 February 2016
Decided on:	21 December 2016
Summary:	Joinder — direct and substantial interest — challenge to an eviction order — reoccupation of a house occupied by another party subsequent to eviction proceedings —current occupant of the house to be joined as a party

ORDER

Whether a person who is allowed by the owner of a house to occupy that house after the eviction of another person has a direct and substantial interest and, therefore, should be joined in proceedings where the evicted person challenges the eviction order and seeks to reoccupy the house.

Order

1. Mr Willem Breda and his family are joined as the second and further respondents in the application for leave to appeal brought by the current applicants in the proceedings under case no CCT 186/15.
2. There is no order as to costs.

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring):

Introduction

[1] The background to this matter is contained in a judgment dealing with an application for leave to appeal between the same parties which is being handed down at the same time as this judgment.[1] I do not propose to repeat the factual background. This judgment is on whether Mr Willem Breda and his family should be joined in the application for leave to appeal and the appeal dealt with in the other judgment. It should suffice to say this: Mr Snyders, who is the first applicant in the application for leave to appeal, his wife and their family were evicted by Ms de Jager, the respondent

[1] *Snyders and Others v de Jager* [2016] ZACC 55.

in that matter, from a house which they occupied on a farm (Stassen Farm) of which Ms de Jager is the manager.

[2] After Mr Snyders and his family had been evicted from the house, Ms de Jager moved Mr Breda and his family into that house. If this Court upholds Mr Snyders' appeal, he will be entitled to move back into the house from which he and his family were evicted by Ms de Jager. If that were to happen, Mr Breda and his family would still be living in the house. They may refuse to vacate the house when asked to make way for Mr Snyders and his family. The question then arose whether Mr Breda and his family should not be joined in the application for leave to appeal.

Should Mr Breda and his family be joined?

[3] On 2 March 2016 - which was after the hearing of this matter in this Court - the Chief Justice issued directions to Mr Willem Breda inviting him and his family to indicate whether they wished to be joined as respondents in the application for leave to appeal brought by Mr Snyders and his family as well as in the appeal if leave was granted. In the same directions, Mr Breda and his family were invited to make whatever representations they wished to place before the Court on why an eviction order should not be granted against him and his family should Mr Snyders' appeal succeed. That would be if this Court held that the eviction order granted by the Magistrate's Court against Mr Snyders, his wife and family should not have been granted.

[4] In due course Mr Breda filed affidavits in response to the Chief Justice's directions. Mr Breda and his family indicated that they did not wish to be joined in the proceedings. He did not give any reasons. Mr Breda then went on to make representations as to why this Court should not make an eviction order against him and his family if Mr Snyders' appeal succeeded.

[5] In *Klaase*[2] a Magistrate's Court had granted an eviction order against Mr Klaase and all those occupying a certain house through him which included his wife, Mrs Klaase, even though Mrs Klaase had not been joined as a respondent in the eviction application. When the Magistrate's Court's eviction order was the subject of an automatic review by the Land Claims Court in terms of section 19(3) of the Extension of Security of Tenure Act (ESTA),[3] Mrs Klaase applied to the Land Claims Court to be joined in the proceedings but the Land Claims Court dismissed her application. She then appealed to this Court.

[6] This Court held that Mrs Klaase had a direct and substantial interest in the order sought by the owner of the land against her husband which included her and all those who were occupying the property through Mr Klaase. The Court confirmed that the test for joinder is that a litigant must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the Court in the proceedings concerned. This Court referred to *ITAC*[4] and pointed out that the overriding consideration was whether it was in the interests of justice for a party to intervene in the litigation.[5]

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[2] *Klaase v van der Merwe N.O.* [2016] ZACC 17; 2016 (9) BCLR 1187 (CC).

[3] 62 of 1997. Section 19(3) of ESTA reads:

> "Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before 31 December 1999, shall be subject to automatic review by the Land Claims Court, which may—
>
> (a) confirm such order in whole or in part;
>
> (b) set aside such order in whole or in part;
>
> (c) substitute such order in whole or in part; or
>
> (d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit."

[4] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*).

[5] See *Klaase* above n 2 at para 45.

[7] This Court went on to say: "Mrs Klaase has a direct and substantial interest in the relief sought against Mr Klaase."[6] In giving reasons for this, this Court said:

> "It is undisputed that [Mrs Klaase] has lived on the farm, continuously and openly . . . It is apparent from the probation officer's report that Mrs Klaase, together with her children and grandchildren, will be rendered homeless because of the unavailability of alternative accommodation if evicted."

The eviction order sought in the Magistrate's Court was sought against her as well. Reference must also be made to section 26(3) of the Constitution. It reads:

> "No one may be evicted from their home or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[8] Section 10(3) of ESTA is also relevant. It reads:

> "If—
>
> (a) suitable alternative accommodation is not available to the occupier within a period of nine months after the date of termination of his or her right of residence in terms of section 8;
>
> (b) the owner or person in charge provided the dwelling occupied by the occupier; and
>
> (c) the efficient carrying on of any operation of the owner or person in charge will be seriously prejudiced unless the dwelling is available for occupation by another person employed or to be employed by the owner or person in charge,
>
> a court may grant an order for eviction of the occupier and of any other occupier who lives in the same dwelling as him or her, and whose permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to—
>
> (i) the efforts which the owner or person in charge and the occupier have respectively made in order to secure suitable alternative accommodation for the occupier; and

[6] Id at para 46.

> (ii) the interests of the respective parties, including the comparative hardship to which the owner or person in charge, the occupier and the remaining occupiers shall be exposed if an order for eviction is or is not granted."

This provision means that a court may grant an eviction order against someone whose right of residence is dependent upon an occupier as defined.

[9] A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.

[10] In the context of eviction proceedings a court may not competently make an order that either directly or indirectly requires someone to be evicted without that person having been joined in the proceedings and heard. To do otherwise would mean that a court may in effect directly or indirectly order someone's eviction without the person having been given an opportunity to be heard. Indeed, that would mean that the court would be making an eviction order against someone without it having heard from that person in regard to all his or her circumstances that the court is enjoined by section 26(3) of the Constitution to consider. That is where the eviction order relates to someone's home.

[11] I have already quoted section 26(3) of the Constitution as well as section 10(3) of ESTA. Section 10(3) contemplates that a court that grants an eviction order against an occupier such as is referred to in that provision may also grant an eviction order against "an occupier who lives in the same building as him or her, and whose

permission to reside there was wholly dependent on his or her right of residence if it is just and equitable to do so, having regard to" certain factors set out therein.

[12] In the present case, if we conclude that the Magistrate's Court erred in granting the eviction order and the Land Claims Court erred in confirming that order, it will follow that the Magistrate's Court should have dismissed Ms de Jager's application. We would then have to replace the eviction order of the Magistrate's Court with an order dismissing the application. The implication of such an order would be that Mr Snyders and his family must be granted vacant possession of the house from which they were evicted. This would entail that Ms de Jager should get Mr Breda and his family out of the house.

[13] If Mr Breda refused to vacate the house, the question that would arise is what Ms de Jager could do to achieve the restoration of the peaceful possession of the house to Mr Snyders and his family. There would be no eviction order against Mr Breda and his family that could be given to the Sheriff to execute and ensure Mr Breda's eviction. If Ms de Jager decided to institute eviction proceedings against Mr Breda and his family that could delay the finalisation of the matter by a few more years if there were to be appeals. This would frustrate the success of Mr Snyders' appeal and this Court's order replacing the eviction order of the Magistrate's Court.

[14] Furthermore, if Ms de Jager did not genuinely want Mr Snyders and his family back in the house and wanted Mr Breda and his family to continue occupying the house, she could arguably take her time in pursuing the eviction application against Mr Breda and his family or even make sure that the application was defective so that it would be dismissed. If the application or action was dismissed, that would then be the end of the road. In this regard I am referring to a situation where, even after all appeals have been exhausted, the result is that Ms de Jager's application or action for Mr Breda's eviction and the eviction of his family fails. That would be the end of the matter. Mr Snyders and his family would not have been able to have peaceful possession of the house restored to them and Mr Breda would remain within the house

despite this Court having found that Mr Snyders and his family should not have been evicted. All of this would be very frustrating.

[15] It seems to me that the above scenario would render Mr Snyders' victory on appeal before us a hollow one. Our order would have been ineffective and rendered worthless. This type of result could happen in a case where a litigant has paid a lot of money in legal fees and costs but, after victory in the highest court in the land, he would discover that he has nothing to show for the victory. In my view, the way to avoid this possible frustration of the court processes is to join Mr Breda and his family in the proceedings. If this Court concludes that the Magistrates' Court should have dismissed Ms de Jager's application, this Court should consider whether or not it would be just and equitable to grant an eviction order against Mr Breda and his family so as to make way for Mr Snyders and his family to go back to the house.

[16] The advantage of this approach is that, if Mr Breda refuses to vacate the house, Mr Snyders' attorney could simply instruct the Sheriff to execute the eviction order. This would mean evicting Mr Breda and his family from the house so that Mr Snyders and his family could re-occupy the house. That would be effective and would not result in the institution of other eviction proceedings that could take years before finality is reached. At the same time all concerned parties would have been heard before the Court makes the final decision.

[17] The eviction of Mr Breda and his family from the house previously occupied by Mr Snyders and his family does not mean their eviction from the Stassen Farm. Indeed, there is a vacant house, the wendy house, which Ms de Jager said provides proper accommodation which she was prepared to offer to Mr Snyders and his family. There is no reason why Mr Breda and his family cannot be given that house to occupy. If, in the meantime, Mrs de Jager has given that house to someone else to occupy despite knowing that this Court has not given its judgment in this matter, she will have herself to blame and she will have to see where she accommodates Mr Breda and his family. This is a bed that Ms de Jager made on 1 October 2015

when she abruptly evicted Mr Snyders and his family from the house in question and put Mr Breda and his family into the house without ascertaining from Mr Snyders or his attorneys whether he was still going to pursue litigation after the decision of the Supreme Court of Appeal. Now, she must lie in it. She has no one else to blame for this.

[18] I have had the opportunity of reading the judgment by my Colleague, Froneman J, in which he concludes that it is not necessary to join Mr Breda and his family. He concludes that, if we uphold Mr Snyders' appeal, both Ms de Jager and Mr Breda will be bound by our decision even if Mr Breda has not been joined as a party.

[19] I am prepared to assume that this is correct but the difficulty I have is that, without an order evicting Mr Breda from the house, he could again refuse to move out of the house just as he refused to move out after this Court had granted the applicants interim relief. If he were to refuse to vacate the house, then Ms de Jager would have to institute fresh eviction proceedings, probably in the Magistrate's Court. We are dealing with this matter almost eight years after Ms de Jager instituted the eviction proceedings against Mr Snyders and his family in the Magistrate's Court, Ladismith. It could, therefore, be another seven or eight years of waiting for Mr Snyders and his family before finality is reached in this matter if we adopt the approach suggested by my Colleague.

[20] We should avoid such a long delay in bringing litigation to finality where we can. In my view, this is one of those cases where we can. We have afforded Mr Breda and his family an opportunity to be heard and, by joining Mr Breda and his family in the main proceedings, we are going to make sure that the judgment we give is an effective one. If we did not do this and the litigation took 12 years to reach finality, people may start losing faith and confidence in our courts.

[21] I conclude that Mr Willem Breda as well as all those occupying the house through him should be joined as the second and further respondents. There is to be no order as to costs with regard to the joinder.

[22] The following order is made:

1. Mr Willem Breda and his family are joined as the second and further respondents in the application for leave to appeal brought by the current applicants in the proceedings under case no CCT 186/15.
2. There is no order as to costs.

FRONEMAN J:

[23] This matter started off before us as an application for leave to appeal by one family (Snyders family) against an eviction order granted against them. It now threatens to end in an eviction order by this Court against another family (Breda family) who was not even a party to the original leave to appeal proceedings and who does not wish to be joined as a party at this late stage. That sounds strange. It is, because the law, if allowed to run its normal course, does not require the joinder of the Breda family, or an eviction order by this Court against them for a just resolution of the appeal.

[24] My colleague Zondo J has written a number of judgments dealing with different aspects of the proceedings. It is necessary to clarify my position in relation to these before proceeding. I was not part of the coram of the Court when the interim order against the Breda family was made. Accordingly, I have no comment on the merits of that decision, only on its legal effect on their possible joinder (joinder judgment) and eviction (merits judgment). It is only in relation to the joinder and eviction of the Breda family that I differ from my colleague. Otherwise, for the reasons he gives, I agree that leave should be granted, that the appeal should succeed and that the original application for eviction of the Snyders family should be

dismissed. So too with the costs orders and the finding that Ms de Jager is not guilty of any contempt.

[25] What follows are the reasons why joinder of the Breda family should not be ordered and why this Court should not issue an eviction order against them.

[26] The Breda family gained occupation of the dwelling only after the Supreme Court of Appeal judgment was handed down. Before that they had no right to occupy the premises. They therefore could not have had an existing direct and substantial interest in the subject matter of the litigation in the Magistrate's Court, which went on review to the Land Claims Court and then on appeal to the Supreme Court of Appeal. The further appeal to this Court must be decided on the facts on record in the appeal before the Supreme Court of Appeal.

[27] On noting the application for leave to appeal to this Court from the Supreme Court of Appeal the operation and execution of the judgment of the Supreme Court of Appeal was automatically suspended "with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment".[7] The purpose of this rule "is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from".[8]

[28] The occupation given to the Breda family by Ms de Jager after the Supreme Court of Appeal handed down its judgment could thus not survive or trump the legal consequences flowing from the noting of the appeal. If Ms de Jager wished to legitimise her perhaps precipitated action in allowing the Breda family to occupy the

[7] Per Corbett JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A); [1977] 4 All SA 53 (A) at 545A (*South Cape Corporation*). This was the common law position, reinforced by rule 49(11) of the Uniform Rules of Court and now section 18 of the Superior Courts Act 10 of 2013.

[8] *South Cape Corporation* id.

premises, she would have had to apply for leave to allow the occupation of the Breda family to continue, which she did not do. She cannot rely on her own unlawful act to frustrate the implementation of the final order on appeal.

[29] Nor can the Breda family. They had no existing direct and substantial interest in the proceedings before us on appeal.[9] They occupied the dwelling only after the judgment of the Supreme Court of Appeal. Their occupation was derivative and could only flow from any competence that Ms de Jager may have had to grant permission to them to occupy the dwelling. As stated above, the noting of the appeal deprived Ms de Jager of any competence to frustrate the eventual final finding on appeal. She had no "right" to pass on to the Breda family.

[30] The outcome of the appeal is authority on the legal issues which would be directly in point in relation to the Bredas' later claim to occupation. Any assertion by the Breda family that our decision is not *res judicata*, or does not prevent the operation of the doctrine of issue estoppel, between them and Ms de Jager, as far as their eviction from the dwelling is concerned, cannot be sustained because of this. They and Ms de Jager are "'deemed' to be the 'same person' or . . . are identified with one another for the purposes of *res judicata*"[10] or issue estoppel.[11]

[31] The interim order changed none of this. In effect it attempted to preserve what the rules of court in any event provided for. The legal difficulties experienced in giving effect to the order flowed from the fact that no final pronouncement had been given on the outcome of the appeal. Those difficulties have now been resolved. Neither Ms de Jager nor the Breda family have any legal ground for not giving effect

[9] Joinder may be ordered on appeal where a third party's *existing* rights may be directly and substantially affected (*Collin v Toffie* 1944 AD 456; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A); *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)); [1949] 4 All SA 544 (A); or where the order would impact on the constitutional housing obligations of a local authority (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) at para 38).

[10] *Royal Sechaba Holdings v Coote* [2014] ZASCA 85; 2014 (5) SA 562 (SCA) at para 14.

[11] Id at paras 17-21.

to the order on appeal of this Court. Ms de Jager must allow the Snyders family to return and must provide suitable and adequate alternative housing to the Breda family.

[32] There is no further need to order joinder of the Breda family in order to give an effective eviction order against them that did not form part of the appeal. The legal consequences of the successful appeal are clear and they must run their normal course. Paragraphs 1 to 3 and 7 of the order in the merits judgment are all that is necessary.

[33] This is a matter where, with common sense and a sense of humanity, there should have been no need to come to court at all. Legal representatives are able to steer conflicts in a conciliatory direction if they give sensible advice to their clients. In the joinder judgment, Zondo J makes mention of potential difficulties if joinder and eviction of the Breda family are not ordered. All that will however not eventuate if Ms de Jager and the Breda family understand and appreciate the consequences of the order in the eviction appeal. The Snyders family must be restored to their possession and the Breda family, in their turn, must be given occupation of a dwelling on the farm where they can live and work with dignity. Even after all that has passed, it is better for all concerned to effect this in a dignified and conciliatory manner, if possible by agreement between all.

For Applicants:	P R Hathorn SC with U K Naidoo instructed by J D van der Merwe Attorneys.
For Respondent:	J J Botha instructed by Blyth & Coetzee.